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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. IGNACIO SAENZ, Appellant.	2 CA-CR 2009-0075 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200601131

Honorable Boyd T. Johnson, Judge
Honorable Delia Neal, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Robert A. Walsh — Phoenix
Attorneys for Appellee

Harriette P. Levitt — Tucson

and

Ritter Law Group, L.L.C.
By Matthew A. Ritter — Florence
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, Ignacio Saenz was convicted of resisting arrest, third-degree escape, and unlawful flight from a pursuing law enforcement vehicle. The trial court sentenced him to consecutive, enhanced, maximum prison terms of 2.75 years each for resisting arrest and escape and 3.75 years for unlawful flight. On appeal, Saenz challenges his sentences, arguing the court considered improper aggravating factors and failed to give sufficient weight to a mitigating factor in sentencing. For the reasons set forth below, we affirm.

Facts and Procedural Background

¶2 On June 23, 2006, at 8:55 p.m., Arizona Department of Public Safety Officer Manjarres was patrolling Interstate 8 in Pinal County. He observed a pick-up truck, driven by Saenz, "cross[] over the solid white line . . . that separates the slow lane from the emergency lane" for approximately three feet and then return to the driving lane. He followed the truck, determined it was going sixty miles per hour in a seventy-five-mile-per-hour zone, and observed it travel into the emergency lane again. He then initiated a traffic stop.

¶3 When Saenz rolled down the window, Manjarres smelled a "moderate odor of alcohol emitting from the vehicle." He noticed Saenz's face was flushed and his speech slurred. Saenz agreed to perform two field sobriety tests but refused to perform a third. Based on his performance on the tests, Manjarres decided to arrest Saenz for driving under the influence of intoxicating liquor (DUI) while impaired to the slightest degree. Saenz physically resisted as Manjarres attempted to place handcuffs on him, so Manjarres released him to create distance and drew his taser. As Saenz ran toward his truck, Manjarres fired his taser, hitting Saenz in the back. Saenz removed the taser

"probes" and fled in his truck. A twenty-six-mile chase ensued, ending when Saenz drove his truck into the desert, turned off his lights, and fled on foot. Saenz was arrested at his place of work a few days later.

¶4 A grand jury indicted Saenz for resisting arrest, unlawful flight from a pursuing law enforcement vehicle, and third-degree escape. The jury found him guilty of all charges, and the trial court sentenced him as noted above. This timely appeal followed.

Discussion

¶5 Saenz argues the trial court erred in imposing the maximum aggravated sentences on all counts, asserting the court applied some aggravators more than once, considered improper aggravating factors, and failed appropriately to consider mitigating evidence. Because Saenz did not object to the court's use of the aggravating factors or present any mitigating evidence below, we review this argument for fundamental, prejudicial error only. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, an illegal sentence, imposed in excess of the authorized statutory range, constitutes fundamental error. *State v. Alvarez*, 205 Ariz. 110, ¶ 18, 67 P.3d 706, 712 (App. 2003).

¶6 Before trial, the state alleged eight aggravating factors, six of which ultimately were submitted to the jury: (1) attempt to cover up the crime, (2) lengthy criminal history, (3) prior felony and/or misdemeanor convictions, (4) failure to seek rehabilitation, (5) need for deterrence, and (6) indictment for another offense. The jury found all six factors had been proven beyond a reasonable doubt. At sentencing, the trial court stated it had considered "the documents provided" and gave Saenz an opportunity

to respond to the probation department's recommendation that he receive the maximum aggravated sentences. However, Saenz neither challenged the recommendation, nor, as noted above, provided any evidence in mitigation. "In light of the criminal history presented and the aggravating factors that were found," the court concluded the maximum aggravated sentences were appropriate.

¶7 The trial court used one of Saenz's three prior historical felony convictions to enhance his sentence; his remaining convictions therefore were available to be used in aggravation. A defendant with one historical prior felony conviction is eligible to receive the aggravated sentence "if at least two of the aggravating circumstances listed in [A.R.S.] § 13-701, subsection D apply." A.R.S. § 13-703(B)(2), (F).[1] Generally, trial courts have broad discretion in imposing a sentence, and we will not disturb a sentence that is within the statutory range unless the court clearly has abused that discretion. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). However, "[i]f the trier of fact finds aggravating circumstances and the court does not find any mitigating circumstances, the court shall impose an aggravated sentence." § 13-701(F); *see also State v. Martinez*, 210 Ariz. 578, ¶ 19, 115 P.3d 618, 623 (2005).

¶8 Saenz contends the first aggravator, covering up an offense, was "inherent in the crime of escape and should not have been used to augment his sentence." However, he has provided no argument or citation to authority to support this claim. *See*

[1]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see id.* § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

Ariz. R. Crim. P. 31.13(c)(vi) (appellant's brief shall contain argument with "contentions of the appellant . . . and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on"). It therefore is abandoned and we need not address it.[2] *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004). He argues alternatively there was insufficient evidence to prove he had attempted to cover up an offense because "the crimes of which [he] was convicted . . . were not subject to being 'covered up.'" And, he asserts that it is speculation to assume the jury concluded he had fled to cover up the DUI offense.

¶9 We will find evidence insufficient to support an aggravating factor only where it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *See State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Here, the state presented evidence that Manjarres was attempting to arrest Saenz for DUI when he began physically resisting and ultimately fled. And, during the aggravation/mitigation portion of trial, the jury also was informed that Saenz had two prior DUI convictions. Thus, the jury reasonably could have inferred that Saenz was aware of the evanescent nature of DUI evidence and fled in an attempt to prevent any physical evidence from being obtained. The trial court did not err in considering this aggravating factor.

[2]In any event, we would not conclude that "covering up" a crime is inherent in the crime of escape. Third-degree escape requires only that the person "knowingly escape[] or attempt[] to escape from custody" after having been arrested for, charged with, or convicted of a misdemeanor or petty offense. A.R.S. § 13-2502. There is no requirement that the purpose of the escape be to conceal evidence of a crime.

¶10 Saenz next argues the trial court erred in finding factors (2) through (5) separately because they "are all one and the same." Essentially he contends that because his lengthy criminal history necessarily involves prior criminal convictions, a lack of rehabilitation, and deterrence, the court improperly considered his criminal history four times in aggravation. However, "[a] jury, like a sentencing judge, may use one fact to find multiple aggravators, so long as the fact is not weighed twice when the [court] assesses aggravation and mitigation." *State v. Velazquez*, 216 Ariz. 300, ¶ 22, 166 P.3d 91, 98 (2007); *see also State v. Bolton*, 182 Ariz. 290, 310, 896 P.2d 830, 850 (1995) (permissible to use victim's age to establish two aggravators, provided age only weighed once).

¶11 There is nothing in the record to suggest the trial court counted Saenz's criminal history more than once. Although its existence was relevant to the jury's findings that his criminal history was lengthy, that he had not sought rehabilitation, and that deterrence was necessary, each factor is distinct. For example, the existence of prior convictions does not necessarily mean there are many prior convictions or that they constitute a lengthy criminal history. The jury heard evidence that Saenz had at least three prior convictions dating back to 1994, and from this evidence, it reasonably could have determined that he had committed multiple offenses independently from a determination that his criminal history spanned a lengthy period of time. Similarly, Saenz's criminal history does not necessitate a finding that he had failed to seek rehabilitation or that the maximum prison terms were necessary to deter him from committing crimes.

¶12 In any event, at sentencing the trial court stated it was imposing the aggravated sentences based on "the criminal history presented and the aggravating factors." This suggests that it considered Saenz's criminal history only once and separately from the other aggravating factors the jury found. On this record, we "cannot infer that [the court] misapplied the law" by weighing Saenz's criminal history more than once. *Bolton*, 182 Ariz. at 310, 896 P.2d at 850; *see also State v. Styers*, 177 Ariz. 104, 116, 865 P.2d 765, 777 (1993) (trial court presumed to know and correctly apply law).

¶13 Saenz also argues the trial court erred in considering as an aggravating factor his indictment for subsequent offenses committed while he was on release in the present case. He contends the subsequent offenses were considered improperly because they "had absolutely no relation to the instant offense" and because they did not constitute "serious criminal activity." "The trial court may consider a defendant's criminal character and history . . . even if the defendant's conduct has not resulted in a conviction." *State v. Shuler*, 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989). However, the "court may not aggravate a sentence 'based on the mere report of an arrest with no evidence of the underlying facts to demonstrate that a crime or some bad act was probably committed by the defendant.'" *State v. Romero*, 173 Ariz. 242, 243, 841 P.2d 1050, 1051 (App. 1992), *quoting Shuler*, 162 Ariz. at 21, 780 P.2d at 1069. "A finding of probable cause satisfies this requirement." *State v. Johnson*, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (App. 1995).

¶14 Here, the state introduced a copy of Saenz's indictment for the subsequent offenses that necessarily involved a grand jury finding of probable cause to believe he committed the offenses. And, contrary to his assertion that the subsequent indictment

involved a misdemeanor DUI charge, the indictment alleges two counts of aggravated assault with a deadly weapon, to wit: a knife. These are "serious criminal offenses" bearing on the defendant's criminal and moral character. The trial court therefore did not err in submitting this aggravating factor to the jury and considering it in determining Saenz's sentences. *See id.*; *State v. Rebollosa*, 177 Ariz. 339, 401, 868 P.2d 982, 984 (App. 1993) (sentence appropriately aggravated based on other court's finding of probable cause defendant committed subsequent offense). The court appropriately considered all six aggravating factors found by the jury in imposing Saenz's sentences. He therefore was eligible for the maximum aggravated prison term for each of his convictions.

¶15 Saenz nevertheless maintains the aggravated sentences imposed by the trial court amount to an abuse of discretion because the court "disregarded a mitigating circumstance it was obliged to consider." Although Saenz presented no mitigation evidence at sentencing, he contends "A.R.S. § 13-702(D) imposes a mandatory duty on the trial court to consider evidence of 'impaired capacity' in mitigation." A trial court abuses its discretion in sentencing when it acts "arbitrarily, capriciously or fail[s] to adequately investigate" the facts relevant to sentencing. But, we generally will find no such abuse when the court "fully considers the factors relevant to imposing sentence." *Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357; *see also State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001). We additionally presume the court considers all relevant sentencing evidence presented, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), but the "weight to be given any factor asserted in mitigation rests within the trial court's sound discretion," *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357.

¶16 Before trial, the court ordered a Rule 11, Ariz. R. Crim. P., evaluation assessing Saenz's competency to stand trial, and prior to sentencing, it ordered another mental health evaluation be conducted pursuant to Rule 26.5, Ariz. R. Crim. P. The court stated it had reviewed the documents provided, including "the comments from Doctor Munoz," who conducted the post-trial evaluation. Munoz concluded Saenz was "exhibiting psychological dysfunction of mild to moderate severity," and provided a recommended treatment plan. Despite Munoz's report, the court did not consider Saenz's mental health status to be severe enough to constitute a mitigating circumstance in sentencing. But a trial court "is not required to find mitigating factors just because evidence is presented; [it] is only required to consider them." *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986); *see also Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 537. Here, the court stated it considered all of the evidence presented, and the sentence it imposed was within the statutorily authorized range. We therefore cannot say the court erred, let alone fundamentally erred, in imposing the maximum aggravated sentences for Saenz's convictions.

Disposition

¶17 For the reasons set forth above, we affirm Saenz's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge